

RONALD THOMAS)
 Claimant)
 VS.)
 Respondent)
BUTLER TRANSPORTATION CO.)
 Respondent)
 AND)
 Respondent)
KANSAS TRUCKERS RISK MGT. GROUP)
 Insurance Carrier)

Docket No. 230,756

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

The issue of whether claimant's accidental injuries arose out of and in the course of his employment is a jurisdictional issue listed in K.S.A. 1997 Supp. 44-534a.

On January 16, 1998, the date of claimant's alleged accident, claimant was employed by the respondent as an over-the-road truck driver. Claimant lived in Illinois but worked out of respondent's terminal located in Kansas City, Kansas. Respondent dispatched claimant from his home in Illinois to Tennessee to pick up a load and transport the load to Kansas City, Kansas, on January 12, 1998. However, claimant stopped at his home in Illinois and notified the respondent he could not deliver the load to Kansas City, Kansas, on January 12, 1998, because he had to have emergency surgery on his neck. Claimant told respondent he would complete the delivery of the load on January 13, 1998.

Claimant did not deliver the load to Kansas City on January 13, 1998, and respondent was unable to contact claimant concerning the status of the load. Therefore, respondent sent drivers to Illinois to find the tractor-trailer rig and to drive it back to Kansas City. The drivers found the tractor-trailer rig abandoned at a truck stop in Illinois and returned the load to Kansas City.

Thereafter, claimant drove his personal car to respondent's terminal in Kansas City, Kansas, on January 16, 1998, to pick up his paycheck. Claimant testified he was physically attacked by four employees of the respondent while he was in respondent's office picking up his paycheck. Claimant testified he was thrown against the wall, placed in headlock, and punched in the head by those employees.

After the altercation, claimant went to the emergency room at the University of Kansas Medical Center in Kansas City, Kansas. He was treated by an emergency physician whose medical records were admitted into evidence. Those records indicated claimant had a preexisting walnut-size mass on the left side of his neck below his left ear. The emergency physician took a biopsy of the tissue but did not remove the mass. The emergency medical records also indicate that claimant had complaints of discomfort in his shoulder area. Claimant was released and instructed to follow up immediately in Illinois with an ear, nose, and throat surgeon.

After claimant returned to Illinois, he saw Peter A. Selz, M.D., on January 22, 1998. After examining the mass/lesion on the left side of claimant's neck, Dr. Selz decided the lesion should be removed. On February 6, 1998, Dr. Selz removed the tumor, which was eventually diagnosed as cancerous, from the left side of claimant's neck. Dr. Selz's medical records indicate the tumor was not caused by trauma. Dr. Selz noted in his medical record dated March 2, 1998, that claimant was quite upset because the doctor did not relate the cause of the tumor to trauma.

Claimant was also treated for neck and left shoulder pain by Thomas G. Dueker, D.C., a local chiropractor. When claimant's left shoulder complaints did not improve, Dr. Dueker referred claimant to Karl E. Swanson, M.D.

Dr. Swanson first saw claimant on February 24, 1998, and prescribed an MRI examination of claimant's cervical spine and left shoulder. The MRI examination of claimant's left shoulder was normal. However, the preliminary hearing record contains a letter from Dr. Swanson to claimant's attorney dated March 8, 1998, that attributes claimant's left shoulder symptoms to the January 16, 1998, altercation.

The respondent had claimant's supervisor; Michael R. Green, Vice President of Operations; and Shelly Webb, payroll clerk, testify at the preliminary hearing. Both gave a different version of the extent of the physical attack claimant suffered at the hands of respondent's employees, including Mr. Green, on January 16, 1998. Both testified claimant was yelling and cussing at the time he picked up his paycheck, and Mr. Green had to remove claimant from respondent's office. Both testified that Mr. Green simply pushed the claimant out of the office, and claimant was not shoved against the wall, placed into headlock, or punched by Mr. Green or any other of respondent's employees.

The Appeals Board finds the medical records admitted into evidence at the preliminary hearing are persuasive that the cancerous tumor removed from the left side of claimant's neck was not the result of any trauma claimant received in the physical altercation that occurred on January 16, 1998. Nor was there any medical evidence the surgery was made necessary by the trauma.

In regards to claimant's alleged left shoulder injury, Dr. Swanson's diagnosis is based on claimant's subjective complaints as the MRI examination of the left shoulder was normal. Therefore, the Appeals Board finds the critical issue in this case is the credibility of the claimant.

Claimant admitted, during his testimony, he lied when he notified the respondent he could not bring the load to Kansas City on January 12, 1998, because he had to have emergency surgery on his neck. Claimant testified he lied because he needed time to look for other employment. The Appeals Board finds, because of this untruthfulness, it is questionable whether claimant is telling the truth in reference to the extent of the physical altercation that took place in respondent's office on January 16, 1998. The Appeals Board also finds it is questionable whether claimant's left shoulder subjective complaints are truthful.

Therefore, the Appeals Board concludes, at this juncture of the proceedings, claimant has failed to prove his tumor removed from the left side of his neck or his left shoulder complaints have a causal relationship to the altercation that took place in respondent's office on January 16, 1998.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Robert H. Foerschler's Preliminary Decision dated April 7, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

c: Steven D. Treaster, Overland Park, KS
J. Scott Gordon, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director